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Evelyn Asher Sheerin, Trustee for the benefit of The Chris
H. Sheerin (deceased) and Evelyn Asher Sheerin 1984 Trust
Dated 5/31/84, Evelyn Asher Sherrin, Trustee of the
Chris and Evelyn Sheerin 1990 Trust, Sheerins Inc.;
Bruce Corum, Trustee of the Credit Shelter Trust, Juanita
N. Carter, Charles B. Anderson Trust, Rita P. Anderson
Trust, and Baltes Company ("JV Direct Lenders")

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,
Debtor.

USA CAPITAL REALTY ADVISORS, LLC,
Debtor.

USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,
Debtor.

USA CAPITAL FIRST TRUST DEED FUND, LLC,
Debtor.

USA SECURITIES, LLC,
Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

Chapter 11

**JV DIRECT LENDERS' REPLY
TO OPPOSITION TO MOTION
FOR RELIEF FROM THE
AUTOMATIC STAY (AFFECTS
USA COMMERCIAL
MORTGAGE CO.)**

Hearing Date: June 15, 2006
Hearing Time: 9:30 am

Jones Vargas represents numerous direct lenders who are named beneficiaries ("JV Direct Lenders") of certain loans which were originated and serviced by Debtor USA Commercial Mortgage Co. (hereinafter, "Debtor" or "USA Commercial"). Specifically, Jones Vargas represents Fertitta Enterprises, Inc.; Mojave Canyon, Inc.; A. William and Ranee L. Ceglia; Robert A. and Sandra L. Cowman; Andrew and Ellen Dauscher; Drs. David and Bonny Enrico; David W. and Pamela K. Sexton; Evelyn Asher Sheerin, Trustee for the benefit of The Chris H. Sheerin (deceased) and Evelyn Asher Sheerin 1984 Trust Dated 5/31/84, Evelyn Asher Sherrin, Trustee of the Chris and Evelyn Sheerin 1990 Trust, Sheerins Inc.; Bruce Corum, Trustee of the Credit Shelter Trust Juanita N. Carter, Charles B. Anderson Trust, Rita P. Anderson Trust, and Baltes Company. The JV Direct Lenders are among the roughly 3,600 direct lenders who provided funds for loans originated and serviced by USA Commercial.

On May 11, 2006, JV Direct Lenders moved for relief from the automatic stay (Ct. Dkt. #s 208, 509, Motion and Section 362 Information Sheet, respectively). Response briefs were filed by USA Commercial (Ct. Dkt. #387); the Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (Ct. Dkt. #376); the Official Committee of Holders of Executory Contract Rights through USA Commercial Mortgage Company (Ct. Dkt. #406); and the Official Committee of Unsecured Creditors (Ct. Dkt. #566). On June 2, 2006, the Court approved a stipulation to reschedule the motion hearing to June 15, 2006, and ordered the JV Direct Lenders' to file a reply brief by noon on June 13, 2006 (Ct. Dkt. #452).

This reply is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any other material this Court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

JV Direct Lenders have contractual rights to remove USA Commercial as a servicing agent because of its pre-petition breaches of the loan-servicing agreements. The breaches constitute cause to grant the stay relief, thereby allowing JV Direct Lenders to change the servicing agent when they provide evidence that fifty-one percent of all of the holders of the beneficial interest in a loan support a change in the agent.

JV Direct Lenders reply below to the points raised in the briefs filed in response to its motion.

II. DISCUSSION & ANALYSIS

A. USA Commercial's and Unsecured Creditors' Objections Are Inadequate

JV Direct Lenders address the objections from USA Commercial and the Unsecured Creditors jointly because they raised similar arguments. Additionally, the Unsecured Creditors' opposition fails because it is not supported by affidavits or declarations required by L.R. 9014(d)(1).

1. USA Commercial Had Sufficient Information to Oppose Motion

USA Commercial asserts that it did not have adequate information to respond to the motion because Jones Vargas failed to file a statement of representation pursuant to Federal Rule of Bankruptcy Procedure 2019 and this court order. For the record, Jones Vargas filed its Rule 2019 statement on May 31, 2006 (Ct. Dkt. #423), the first such statement filed by any counsel representing multiple clients. Jones Vargas also sent USA Commercial a list of its clients on May 25, 2006, one day after USA Commercial asked for the information and prior to the response deadline. USA Commercial also stated a list of clients would be acceptable. Ex. 1, USA Commercial letter to Jones Vargas at 2 ("If for some reason you are unable to provide a complete Rule 2019 disclosure at that time, I ask that you provide by that time, at a minimum, a list of each of your clients who are movants with respect to the Motions discussed above."). Moreover, Jones Vargas was unable to provide earlier statement because the Unsecured Creditors requested the firm interview to be committee counsel on May 23, 2006. Jones Vargas ultimately declined one offer to be committee counsel and promptly provided USA Commercial with a list of its clients.

Now USA Commercial asserts it did not have sufficient information about the JV Direct Lenders or sufficient time to prepare a proper response. "As a consequence of this late disclosure, USACM cannot adequately respond to the Motion for Relief." (Ct. Dkt. #387 at 6-7 n.3). "USACM cannot reasonably be expected to be able to adequately respond to the Motion for Relief when it does know [sic] what Serviced Loans are at issues, or the JV Direct Lenders interest in those loans." *Id.* at 6.

USA Commercial's assertions are not credible. As the loan servicing agent, it has the records documenting JV Direct Lenders' loans and interests. Moreover, JV Direct Lenders' motion for stay relief is premised on the loan-servicing agreement. The agreement is a simple form prepared by USA Commercial, used with each lender involved in this case, and identical in all material respects in each loan. The record contains numerous copies of the agreement, including one attached to JV Direct Lenders' motion (Ct. Dkt. #208 at Ex. A). Indeed, USA Commercial did not have a problem drafting and filing a thirteen-page opposition based on the JV Direct Lenders' documents filed with their motion (Ct. Dkt. #387). Whether USA Commercial thinks it had adequate information about the JV Direct Lenders' interests is immaterial, as the motion asks a simple legal question: Whether lenders may change servicing agents pursuant to the contract terms.

2. JV Direct Lenders Acknowledge They Still Must Satisfy Contractual Terms

JV Direct Lenders acknowledge that the loan servicing contract does not authorize an agent change without "approval of fifty-one percent (51%) or more of all of the holders of the beneficial interest of record in the Loan," and that JV Direct Lenders do not constitute at least fifty-one percent of all of the holders of the beneficial interest in their loans. However, the JV Direct Lenders believe it is prudent to seek the Court's advance authorization in order to change servicing agents if and when the JV Direct Lenders and others constitute fifty-one percent of all of the holders of the beneficial interest. JV Direct Lenders do not—and never have—intended to remove USA Commercial as a servicing agent until such time.

In terms of the exact requirements to change the servicing agent, JV Direct Lenders attempted to harmonize Paragraphs 3 and 8 of the contract by stating that they must have fifty-one percent of all of the holders of the beneficial interest and provide thirty-days notice to change agents (Ct. Dkt. #208, Motion at 6). USA Commercial responds that "paragraph 8 does not govern the removal of USACM as the loan servicer of one of the Serviced Loans" (Ct. Dkt. #387, USA Commercial Opposition at 7). JV Direct Lenders accept USA Commercial's interpretation in this regard. Therefore, JV Direct Lenders may remove USA Commercial as the servicing agent

1 immediately upon evidence that a fifty-one percent of all of the holders of the beneficial interest in
2 a loan agree with the replacement, pursuant to Paragraph 3 of the servicing agreement.

3 3. USA Commercial's Breach Constitutes Cause for Stay Relief

4 USA Commercial and the Unsecured Creditors both assert that USA Commercial's pre-
5 petition breach does not constitute cause necessary to justify stay relief (Ct. Dkt. #387, USA
6 Commercial Opposition, *citing Matter of Holly's, Inc.*, 140 B.R. 643, 689 (Bankr. W.D. Mich.
7 1992); #566, Unsecured Creditors Opposition, *citing Holly's* and *In re Tashjian*, 72 B.R. 968, 973-
8 74 (Bankr. E.D. Pa. 1987)). JV Direct Lenders disagree, in light of (1) the severity of USA
9 Commercial's pre-petition illegal conduct and (2) USA Commercial's admission of a continuing
10 violation of Nevada state law by collecting its servicing fee from post-petition borrower payments
11 without advancing the payments to the lenders.

12 In terms of a legal basis, JV Direct Lenders notes that *Holly's* involved proposed relief stay
13 premised on mismanagement, not breach. 140 B.R. at 688-89. Even if mismanagement and
14 breach are equated, *Holly's* also recognized authority that pre-petition mismanagement may
15 provide cause for relief stay. *Id.* at 689, *citing Powers Aero Marine Servs., Inc. v. Merrill Stevens*
16 *Dry Dock Co. (In re Powers Aero Marine Servs., Inc.)*, 42 B.R. 540, 546 (Bankr. S.D. Tex. 1984).
17 The other cited case, *Tashjian*, also recognized that pre-petition breaches may constitute good
18 cause for stay relief. 72 B.R. at 973, *citing In re Lexington Racquetball Club, Inc.*, 58 B.R. 103
19 (Bankr. E.D. Pa. 1986), *In re Tainin*, 48 B.R. 250 (Bankr. E.D. Pa. 1985), and *In re Rush*, 9 B.R.
20 197 (Bankr. E.D. Pa. 1981).

21 JV Direct Lenders' own research also reveals authority holding that a breach constitutes
22 good cause to grant relief from the automatic stay. For example, the Bankruptcy Court for the
23 Central District of California held that cause existed when a debtor failed to make payments in
24 breach of the requirements of a prior confirmed plan. *Lomas Mortgage USA, Inc. v. Elmore (In re*
25 *Elmore)*, 94 B.R. 670, 678 (Bankr. C.D. Cal. 1988); *In re Gilpin*, 209 B.R. 490, 493 (Bankr. W.D.
26 Mo. 1997) (same). In another case, the court held the debtor's rejection of a lease is a breach of
27 contract, which "constitute[s] cause under Section 362(d)(1) for the lessor to seek relief from the
28 stay." *In re Palace Quality Servs. Indus., Inc.*, 283 B.R. 868, 906 n.40 (Bankr. E.D. Mich. 2002).

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In each case, the court held that the debtor's breach of a pre-petition obligation constituted good cause to grant relief from the automatic stay. In the present case, USA Commercial is undisputedly in breach of the loan servicing agreement because it did not keep proper account records, diligently collect all payments, promptly pay each lender, or foreclose or take other necessary action when borrowers failed to pay on their loans. USA Commercial acknowledges it is in pre-petition breach, although it tries to minimize its problems by admitting to "certain irregularities" (Ct. Dkt. #387 at 9). This recharacterization of its conduct is inconsistent with the findings of the State of Nevada's Division of Mortgage Lending, which found USA Commercial violated numerous violations of the Nevada Revised Statutes and Nevada Administrative Code. Ex. 2, Order Conditioning Mortgage Broker's License. USA Commercial breached its loan servicing agreements and violated state law, and JV Direct Lenders are allowed to select a new servicing agent pursuant to the contract terms and state law. Therefore, cause exists to grant JV Direct Lender's motion for relief from the automatic stay to hire a new servicing agent.

Moreover, USA Commercial admits that it is collecting its servicing fee from the lender payments without forwarding the payments to JV Direct Lenders and other similarly situated (#387, USA Commercial Opposition at 4, ¶ 10). This conduct violates Nevada Revised Statute 645B.175(5)(a), which requires a mortgage agent to release lender payments "upon the deduction and payment of any fee or service charge due the mortgage broker." See Ct. Dkt. #377, JV Direct Lenders' Opposition to Debtors' Motion to Temporarily Hold Funds, for additional discussion. Since USA Commercial is collecting its service fees from borrower payments without forwarding the payments to the lenders, it is violating state law. This continued, post-petition misconduct is further evidence that causes exists to warrant relief from the automatic stay.

4. Stay Relief for JV Direct Lenders Does Not Undermine Purpose of Bankruptcy

USA Commercial and the Unsecured Creditors also assert that stay relief undermines the purpose of bankruptcy (Ct. Dkt. #387, USA Commercial Opposition; #566, Unsecured Creditors Opposition). JV Direct Lenders do not dispute the purpose of bankruptcy,¹ but assert that stay

¹ However, JV Direct Lenders object to mischaracterizations by the Unsecured Creditors concerning the relevancy of certain issues in bankruptcy. The Unsecured Creditors asserts the JV Direct Lenders won't be harmed by USA

1 relief is not violative in the context of their role as lenders and USA Commercial's role as
2 servicing agent.

3 As USA Commercial explained, "the legislative history of the Bankruptcy Code makes
4 clear that one of the purposes of the automatic stay is to give a debtor a 'breathing spell from his
5 creditors'" (Ct. Dkt. #387 at 11, *quoting In re Sherman*, 441 F.3d 794, 814 (9th Cir. 2006)
6 (emphasis added by JV Direct Lenders). The automatic stay also provides for "an orderly
7 liquidation procedure under which all creditors are treated equally." *Id.* (emphasis added by JV
8 Direct Lenders).

9 However, JV Direct Lenders are not creditors. A creditor is "one to whom a debt is owed;
10 one who gives credit for money or goods." *Black's Law Dictionary* 304 (Brian A. Garner ed.,
11 abridged 7th ed. 2000). JV Direct Lenders have not loaned money to USA Commercial; USA
12 Commercial's sole role as servicing agent is as a conduit moving money lent by JV Direct Lenders
13 to the borrowers, and subsequent borrower payments to JV Direct Lenders. Since JV Direct
14 Lenders are not creditors, they are entitled to stay relief without interfering with the underlying
15 purpose of bankruptcy.

16 **B. Equity Security Holders Committee Do Not Articulate A Basis for Its Opposition**

17 The Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund,
18 LLC filed a statement in opposition several motions, including the JV Direct Lenders' motion for
19 relief from the automatic stay (Ct. Dkt. #376). However, the statement does not address JV Direct
20 Lenders' requested relief, the ability to change servicing agent. Therefore, the committee's
21 opposition has no bearing on the decision concerning JV Direct Lenders' motion.
22
23
24

25 Commercial's continued role as servicing agent, and that they would receive little benefit under a new servicing
26 agent. The arguments are inapposite. USA Commercial entered into a contract with each JV Direct Lender that
27 authorizes the JV Direct Lender to change servicing agents if USA Commercial breaches the contract. USA
28 Commercial is in pre-petition breach. There is no additional requirement that the JV Direct Lender continue to suffer
harm or demonstrate it can secure a better deal elsewhere. The JV Direct Lenders have a contractual right to change
servicing agent, and they seek an order allowing them do so when they and other lenders represent fifty-one percent
of all of the holders of the beneficial interest in a loan.

C. Executory Contract Rights Committee Supports the General Right to Change Agents

The Official Committee of Holders of Executory Contract Rights through USA Commercial Mortgage Company supports the position that direct lenders are authorized by contract and state law to remove USA Commercial as the servicing agent if they have approval of at least 51 percent of the direct lenders (Ct. Dkt. #406). However, the committee opposes JV Direct Lenders' motion only because the JV Direct Lenders have not established that they constitute 51 percent of the direct lenders in any loan.

Again, JV Direct Lenders acknowledge that the loan servicing contract does not authorize an agent change without fifty-one percent of all of the holders of the beneficial interest in a loan, and that JV Direct Lenders do not constitute at least fifty-one percent in their loans. However, the JV Direct Lenders believe it is prudent to seek the Court's advance authorization in order to change servicing agents should the JV Direct Lenders and others constitute fifty-one percent. JV Direct Lenders do not—and never have—intended to remove USA Commercial as a servicing agent until they and others in agreement constitute fifty-one percent of all of the holders of the beneficial interest in a loan.

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1 **IV. CONCLUSION**

2 USA Commercial has failed to satisfy the terms of its Loan Servicing Agreements with the
3 JV Direct Lenders. Due to USA Commercial's failures, the JV Direct Lenders seek to execute
4 their contractual rights to terminate their servicing contracts with USA Commercial and hire a new
5 servicing agent. Therefore, the JV Direct Lenders move for relief from the automatic stay in order
6 to terminate USA Commercial as the servicing agent on their loans.

7 DATED this 13th day of June, 2006.

8 JONES VARGAS

9 By: //s// Janet L. Chubb
10 JANET L. CHUBB, ESQ.
11 LOUIS M. BUBALA, ESQ.

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CERTIFICATE OF SERVICE

1. On June 13, 2006, I served the following document(s):

**JV DIRECT LENDERS' REPLY TO OPPOSITION TO
MOTION TO OBTAIN RELIEF FROM AUTOMATIC STAY
(AFFECTS USA COMMERCIAL CO.)**

2. I served the above-named document(s) by the following means to the persons as listed below:

■ a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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9 c. Personal Service (list persons and addresses):
I personally delivered the document(s) to the persons at these addresses:

9 For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

9 For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

: d. By direct email (as opposed to through the ECF System) (list persons and email addresses):

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

9 e. By fax transmission (list persons and fax numbers):

Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

9 f. By messenger:

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a messenger for service. (A declaration by the messenger must be attached to this Certificate of Service).

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 13th day of June, 2006.

J. Englehart & Tawney Waldo
Name

//s// Tawney Waldo & J. Englehart
Signature

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